

Volume I  
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**Exhibit 5 - 2**

Appearances Continued:

For the Defendant, Wahlstrom:  
Markham Read Zerner LLC  
One Commercial Wharf West  
Boston, Massachusetts 02110  
By: Bridget A. Zerner, Esq.

For the Defendant, Keenan:  
Todd and Weld LLP  
One Federal Street, 27<sup>th</sup> floor  
Boston, Massachusetts 02110  
By: Ian J. Pinta, Esq.

**Exhibit 5 - 3**

**I N D E X**

**WITNESS**

**DIRECT**

**CROSS**

**REDIRECT**

**RECROSS**

None - Hearing

**Exhibit 5 - 4**P R O C E E D I N G S

(Court called to order 3:06:09 p.m.)

THE CLERK: Calling Docket Number 2184CV741, Austin O'Toole, et al v. David Hoey, et al.

This matter is before the Court for a Rule 12 Hearing.

THE COURT: Two of them I think. One by each set of the defendants.

Plaintiff's counsel?

MR. FOYE: Good afternoon, Your Honor. Edward Foye for Austin O'Toole.

THE COURT: All right. Bear with me one second.

Okay.

MS. ZERNER: Good afternoon, Your Honor. Bridget Zerner for defendant, Kira Wahlstrom.

THE COURT: Okay.

And with you?

MS. KNIPPER: Christine Knipper, Your Honor, for defendant, Attorney Hoey and the Law Offices of David Hoey.

THE COURT: I'm sorry, you represent Mr. Hoey?

MS. KNIPPER: I represent Attorney Hoey and his law firm.

THE COURT: Okay.

MR. PINTA: Good afternoon, Your Honor. Ian Pinta on behalf of Don Keenan and his law firm.

THE COURT: Okay. Thank you for your papers, they are quite thorough. I'll hear from either Ms. Zerner or Mr. Pinta

**Exhibit 5 - 5**

1 with respect to the motions to dismiss.

2 MS. ZERNER: Good afternoon, again, Your Honor. As you  
3 saw in our papers, excuse me, and as you've seen in all of the  
4 filings here, this is a -- an attorney fee dispute.

5 THE COURT: Yes, it is.

6 MS. ZERNER: And if you're familiar, I can go over the  
7 background facts, or do you want me to get to the -- the  
8 arguments?

9 THE COURT: I think the argument is where I'd like you to  
10 go.

11 MS. ZERNER: Okay. Great.

12 As we put in our papers, Mr. O'Toole asserts three claims  
13 against Ms. Wahlstrom based on the alternative theories of  
14 liability on the two fee agreements at issue here. And under  
15 either one, on its breach of contract claim, he fails to state  
16 a claim against Ms. Wahlstrom.

17 First, it -- on this motion, the Court does not need to  
18 decide this dispute that Mr. O'Toole raises about whether or  
19 not the 2015 agreement is legal and binding or supersedes  
20 since he's arguing alternative liability, that doesn't need to  
21 be decided. It also doesn't matter as Mr. O'Toole argues  
22 whether the 2010 contingency fee agreement between Mr. Hoey  
23 and my client, Ms. Wahlstrom, and the referral agreement  
24 between Mr. Hoey and Mr. O'Toole is read as one contract or  
25 not. Either way, even if that's credited, the claim fails.

**Exhibit 5 - 6**

1 Ms. Wahlstrom has not breached either contract when it comes  
2 to Mr. O'Toole or anyone.

3 Under the 2010 fee agreement, she was obligated to pay  
4 33.3 percent as her attorney's fee, and it is undisputed and  
5 alleged in Mr. O'Toole's Complaint that she paid more than  
6 that. And I note that this is -- this amended Complaint comes  
7 later in the case after discovery has occurred and Mr. O'Toole  
8 and his counsel have obtained additional information that --  
9 that we contend should have led them to drop all claims  
10 against Ms. Wahlstrom.

11 Under the 2015 agreement, the same applies. Ms.  
12 Wahlstrom complied and paid over the 33.3 percent owed as the  
13 attorney fee, and Mr. O'Toole's fee by the clear terms of his  
14 referral agreement was only to receive 33.3 percent from what  
15 Attorney Hoey received. There's no breach by Ms. Wahlstrom,  
16 including that the other allegation that's out there, although  
17 it didn't seem to come up in the opposition papers, is this  
18 allegation that she breached by not updating Mr. O'Toole on  
19 the case and these new -- the new referral -- excuse me, the  
20 new fee agreement.

21 The 2010 fee agreement is explicitly clear that that  
22 obligation was solely the attorney's, i.e. Attorney Hoey to  
23 give periodic reports. That is clear in the contract and  
24 there was no obligation for Ms. Wahlstrom to provide any  
25 reports.

**Exhibit 5 - 7**

1           The only other hook -- argument by Mr. O'Toole under the  
2           2015 agreement is that she may be liable under paragraph 10 of  
3           the 2015 contingency fee agreement. But that so clearly does  
4           not apply to Mr. O'Toole. That is a paragraph included under  
5           the Rules of Professional Conduct Rule 1.5 that Mr. O'Toole  
6           cites, that only applies to a situation with successor counsel  
7           coming in to replace former counsel, and the requirement to  
8           address how prior counsel who has now been terminated is going  
9           to get paid. As the Court is familiar and is clear in the  
10          case law, once -- if an attorney is operating under a  
11          contingency fee agreement and he is terminated, he no longer  
12          has a claim to the contingency, but he does have a claim for  
13          the reasonable value of his services under quantum meruit.  
14          That is what paragraph 10 applies to, and Mr. O'Toole makes no  
15          allegation or claim for quantum meruit, he's provided no  
16          billings and given no time. While he points out that he did  
17          some work while representing Ms. Wahlstrom in early -- in 2009  
18          before the 2010 fee agreement, he doesn't offer his time on  
19          that, and I don't think he wants to because I don't think that  
20          would even get him the 250,000 that he's received as a  
21          referral agreement.

22                So again, there is no breach by Ms. Wahlstrom under  
23                either contract, and there is no potential liability for Ms.  
24                Wahlstrom under either contract as to Mr. O'Toole.

25                THE COURT: Okay. Mr. Foye, I'll hear you with respect

**Exhibit 5 - 8**

1 to Ms. Wahlstrom.

2 MR. FOYE: Thank you, Your Honor. With respect to Ms.  
3 Wahlstrom, there are actually three claims at issue. There is  
4 the -- in addition to the breach of contract issues, there's  
5 also the issue of a declaratory judgment on the scope of the  
6 2010 fee agreement. In essence, as Your Honor knows from  
7 reading the papers, the 2015 fee agreement was confected by  
8 Mr. Hoey and Mr. Keenan for the sole purpose of reducing Mr.  
9 O'Toole's fee.

10 At the time the 2015 agreement was created, Mr. Keenan  
11 had, and this seems to be talking about Keenan, I'm actually  
12 talking about Wahlstrom. Mr. Keenan had already signed on to  
13 the trial team. Mr. Keenan already had a fee agreement in  
14 place with Mr. Hoey. Ms. Wahlstrom apparently took Mr.  
15 Keenan's and Mr. Hoey's suggestion that she sign this new fee  
16 agreement. What they said to her, we don't know. Ms. Zerner  
17 has told you that we've had some discovery, we haven't had any  
18 depositions, I haven't gotten very many documents from either  
19 one of the defendants. Motions to compel are probably  
20 overdue, but I wanted to understandably get through the  
21 motions to dismiss because the first argument somebody makes  
22 on a Motion to Compel well it's going to be dismissed anyway.

23 THE COURT: All right. Bear with me a second. Your  
24 claims against Wahlstrom are what? You've got a breach of  
25 contract claim that she had some contract that required her to



**Exhibit 5 - 9**

1 pay --

2 MR. FOYE: Yes.

3 THE COURT: -- your client?

4 MR. FOYE: That's correct, Your Honor.

5 THE COURT: And how much --

6 MR. FOYE: Both contracts.

7 THE COURT: -- how much was she required to pay your  
8 client

9 MR. FOYE: Both contracts said that, Your Honor. The  
10 2015 agreement said that in paragraph --

11 THE COURT: How much was she required to pay your client?

12 MR. FOYE: One-third of the fee.

13 THE COURT: Of what fee?

14 MR. FOYE: That she paid to Mr. Hoey.

15 THE COURT: She's required to pay or Mr. Hoey is required  
16 to pay?

17 MR. FOYE: They both are required to pay, Your Honor.

18 THE COURT: Okay. And how much was Mr. Hoey paid?

19 MR. FOYE: Mr. Hoey -- well that's another. He says he  
20 was paid \$750,000 out of the 4 million.

21 THE COURT: All right. All right. So bear with me a  
22 second. So she's required to pay you say one-third of the fee  
23 to Mr. --

24 MR. FOYE: Yes.

25 THE COURT: -- of the fee that went to Mr. Hoey. And

**Exhibit 5 - 10**

1       that's the breach of contract claim.

2               And then what other claims are you bringing? Declaratory  
3 judgment?

4               MR. FOYE: Declaratory judgment regarding --

5               THE COURT: Which is essentially the same --

6               MR. FOYE: -- the scope of the --

7               THE COURT: -- same question. Yes, she is in fact  
8 entitled to, she's required to pay.

9               MR. FOYE: Well there's also, Your Honor, subsequent  
10 cases. There's a case pending now in the Federal Court which  
11 it's a bad faith insurance -- bad faith claim, bad faith  
12 settlement claim against the insurance companies that  
13 eventually paid the Wahlstrom judgment. Mr. Hoey and Ms.  
14 Wahlstrom litigated that case under the 2010 fee agreement.  
15 That's the signed fee agreement that was in place under which  
16 that case is being litigated, and our contention is the way  
17 that agreement, since Mr. O'Toole is a party to it, A, and B,  
18 given the way that agreement is -- is phrased, Mr. O'Toole is  
19 entitled to one-third of the fee Mr. Hoey receives on that as  
20 well.

21               THE COURT: All right. That hasn't been received yet.

22               MR. FOYE: Since it derived from the -- right.

23               THE COURT: That hasn't been received yet.

24               MR. FOYE: It has not been received.

25               THE COURT: Okay. All right. So you -- all right.

**Exhibit 5 - 11**

1 MR. FOYE: Motions for summary judgment.

2 THE COURT: What other claim --

3 MR. FOYE: I believe are pending.

4 THE COURT: And what other claim do you have against Ms.  
5 Wahlstrom?

6 MR. FOYE: That is it, Your Honor.

7 THE COURT: That's it. So breach of contract and a  
8 declaratory judgment?

9 MR. FOYE: Yes, Your Honor.

10 THE COURT: Okay. And your client is suing his client  
11 who is a victim of rape for money that arguably is due from  
12 Mr. Hoey?

13 MR. FOYE: Yes, Your Honor, because it's --

14 THE COURT: It's unbelievable to me that you would do  
15 that against the person who was his client and who is being  
16 re-traumatized by being in this case.

17 MR. FOYE: Your Honor, I have said that to virtually  
18 every Judge in this case almost in so many words. I am suing  
19 her because it is a contract case and I have to sue her.  
20 Here's what paragraph --

21 THE COURT: You don't have to sue her, you can sue Hoey.

22 MR. FOYE: Your Honor, Mr. Hoey, every single nickel he  
23 has is in a trust somewhere, number one. Number -- apparently  
24 is in a family trust.

25 THE COURT: So you'll attach every -- so you'll attach

**Exhibit 5 - 12**

1 every dime that he gets in the next ten cases.

2 MR. FOYE: Number two, Your Honor, more importantly, Mr.  
3 Hoey and Mr. Keenan are pointing the finger at Ms. Wahlstrom  
4 because the 2015 fee agreement says that Ms. Wahlstrom is  
5 responsible for paying the fees of all prior counsel except  
6 for David J. Hoey.

7 Mr. Keenan in his papers argues that this means that Ms.  
8 Wahlstrom is responsible for paying the fee.

9 Now do I think that's really going to be way this case  
10 shakes out? I do not. And I think that Ms. Wahlstrom has a  
11 very powerful malpractice claim against her attorneys for  
12 gulling her into signing this 2015 fee agreement. And I have  
13 more than once offered to take an assignment of rights on that  
14 in the context -- other context.

15 THE COURT: Ms. Knipper? Where's Ms. Knipper?

16 MS. KNIPPER: Yes, Your Honor.

17 THE COURT: Your client won't indemnify Ms. Wahlstrom so  
18 that Ms. Wahlstrom can be out of this case given the  
19 continuing issues that this -- being in this case is almost  
20 surely to have?

21 MS. KNIPPER: We have expressed openly in Court that we  
22 agree that Ms. Wahlstrom should be dismissed from the case and  
23 that she does not belong in the case. Ms. Wahlstrom has  
24 asserted a claim against Attorney Hoey. And -- which we  
25 anticipate --

**Exhibit 5 - 13**

1 THE COURT: Why can't this be worked out with respect to  
2 Ms. Wahlstrom? I don't understand.

3 MR. FOYE: I've been trying, Your Honor. I've been  
4 trying. I don't understand either. I'll tell you this. I  
5 can tell you this, it's not --

6 THE COURT: All right. Hold on. Hold on. Hold on.

7 MR. FOYE: I'm sorry.

8 THE COURT: I'm raising it because I think it can be  
9 resolved and I'm going to see you in a week to see if it has  
10 been resolved.

11 Mr. Pinta, I'll hear from you.

12 MR. PINTA: Thank you, Your Honor. The primary claim  
13 against my client, Don Keenan, who was successor counsel is a  
14 tortious interference of contractual relations.

15 Now what this case is really about, Your Honor, is Mr.  
16 O'Toole's attempt to rewrite his fee agreement with Mr. Hoey.  
17 That fee agreement, a referral fee agreement, said that Mr.  
18 O'Toole gets thirty-three percent of whatever Mr. Hoey  
19 recovered.

20 My client is an expert in premises liability cases. He  
21 was retained to try this case, and he did successfully. He  
22 didn't do it on a pro bono basis. Just because he took a fee  
23 which then reduced Mr. Hoey's fee, which in turn reduced Mr.  
24 O'Toole's fee, does not mean that my client tortiously  
25 interfered with any kind of contracts. In fact, it's well

**Exhibit 5 - 14**

1 settled law that a tortious interference claim -- a tortious  
2 interference with a contractual relations claim cannot lie  
3 against successor counsel when it's based on a contingent fee  
4 agreement. And the seminal case is the Cavicchi case, Your  
5 Honor, it's a 2006 Mass. Appeals Court case and it's directly  
6 on point.

7 In that case, the plaintiff who was prior counsel,  
8 represented an individual, a client in --

9 THE COURT: It's a case that you cite at some length in  
10 your papers?

11 MR. PINTA: Correct, Your Honor.

12 THE COURT: Okay.

13 MR. PINTA: As did my brother. And in that case, there  
14 was the plaintiff, he represented the underlying client in  
15 vacating a criminal conviction, a murder conviction. He  
16 earned a fee of approximately \$100,000. Thereafter, he filed  
17 and took on a contingency fee case, a civil case against the  
18 state for wrongful incarceration.

19 Thereafter, the defendant, Koski, another attorney, he  
20 disparaged, uttered material misrepresentations and told the  
21 client to not pay the plaintiff on the criminal fee matter and  
22 to discharge him on the civil contingent fee matter. And the  
23 prior counsel brought a claim for tortious interference with  
24 contractual relations just like done here based on those two  
25 agreements. And the Court dealt with those agreements

**Exhibit 5 - 15**

1 differently.

2 With regards to the contingent fee case, which was still  
3 then pending, the Court said claim cannot lie, cannot lie  
4 under any set of facts. And the reason being, is it's rooted  
5 in the Rules of Professional Conduct -- Professional Conduct  
6 and Public Policy. Basically a client has the absolute right  
7 to retain counsel of his or her own choosing. But that's only  
8 good if an attorney is going to do that, and agree to come on  
9 board, and no attorney is going to do that if that attorney  
10 could be susceptible or liable for a tortious interference  
11 claim.

12 So based on Cavicchi, the Court held that with regards to  
13 the then pending contingent fee agreement, a tortious  
14 interference claim cannot lie as a matter of law and public  
15 policy.

16 With regards to the tortious interference with the  
17 criminal fee agreement, that was different. The Court said a  
18 tortious interference claim could lie there because that fee  
19 agreement, that matter had concluded. There was no public  
20 policy implications there because there was no need to get a  
21 new attorney for that case because the case was over. There  
22 was a fee certain. That is not what we have here. Cavicchi  
23 is directly on point. And based on that, it doesn't matter  
24 what allegations are made, and in that case, the plaintiff  
25 alleged that there was defamation, material

**Exhibit 5 - 16**

1 misrepresentations, that the defendant purposely told the  
2 client, the underlying client, to fire the -- the former  
3 counsel so that the defendant could get more money. Even  
4 under those set of allegations, the Court still dismissed it  
5 on a motion to dismiss, Your Honor, exact same, you know, Rule  
6 12(b)(6) motion, and the Court affirmed the dismissal of that  
7 tortious interference with contractual relations claim.  
8 That's the beginning and end of this case as applies to my  
9 client.

10 THE COURT: All right. I'll hear then from Mr. Foye.

11 MR. FOYE: The tortious interference in the Koski case  
12 that was deemed sufficient to go forward, Your Honor, was  
13 telling the client not to pay the bill. Telling the client  
14 not to pay the predecessor's bill. Mr. Keenan not only told  
15 Ms. Wahlstrom not to pay the predecessor's bill, he assisted  
16 Mr. Hoey in creating this fee agreement that was from the  
17 beginning a sham intended to do nothing except reduce Mr.  
18 O'Toole's fee. What had happened was that --

19 THE COURT: Where will I find the allegation in your  
20 complaint that --

21 MR. FOYE: That is in the first amended --

22 THE COURT: -- that Mr. Keenan told the client not to pay  
23 the bill?

24 MR. FOYE: You will not, Your Honor.

25 THE COURT: Do I have that?



**Exhibit 5 - 17**

1 MR. FOYE: You will not.

2 THE COURT: Okay. So --

3 MR. FOYE: You will find allegations that are much worse  
4 than that, that what Mr. Keenan did was not tell the client  
5 not to pay the bill, but rather assist Mr. Hoey in creating a  
6 contractual arrangement that the client was not fully informed  
7 about, apparently, may never have been told about what the  
8 purpose of it was, never understood what -- why she was  
9 signing, what she was signing. But nevertheless, was signing  
10 a paper that was designed to basically take Austin O'Toole's  
11 referral fee and reallocate it to Hoey and Keenan for their  
12 benefit exclusively.

13 At the time they did this, Mr. Keenan had already signed  
14 a contract with Mr. Hoey in 2013 to assist with the case with  
15 Mr. Keenan getting forty percent of the take, and Mr. Hoey  
16 getting sixty percent.

17 In 2015, he filed a notice of appearance pro hac vice in  
18 the Superior Court. Later in 2015, they signed this fee  
19 agreement.

20 Krzysztof Sobczak the attorney, the third attorney who  
21 tried the case with Mr. Hoey and Mr. Keenan has come forward,  
22 there's an affidavit on the record from him, saying this is  
23 what they did. There was one purpose and one purpose only to  
24 this fee agreement, and that was to reduce Mr. O'Toole's take  
25 from it and to reallocate it to Hoey and Keenan. Period. No

**Exhibit 5 - 18**

1 other reason for it. And there could not have been another  
2 reason for it at that point. Keenan had already signed on.  
3 Hoey had spent almost a million dollars in costs up to that  
4 point.

5 So what you have here, Your Honor, is an act of tortious  
6 interference and civil conspiracy that is much -- that meets  
7 and exceeds anything you'll find in Koski or anywhere else.

8 THE COURT: Okay.

9 MR. FOYE: And by the way, that's the real distinguishing  
10 feature in all these cases. All of these cases that Mr. Pinta  
11 cites presume good faith and commercial regulatory. They  
12 presume that the lawyer, the second lawyer, is chosen by the  
13 client freely and the client voluntarily leaves. And that the  
14 two lawyers are not colluding with each other.

15 Mr. Pinta cites a case called Donovan v. Maloney --  
16 Mahoney I think actually, and Donovan sends -- signs a fee  
17 agreement, a referral fee agreement with Mahoney, sends  
18 Mahoney a case, Mahoney sends it on to someone else. Donovan  
19 says I didn't give you permission to do that. The Appellate  
20 Division said you don't need permission. Well fair enough.  
21 Now there was no duty of good faith in that case, there were  
22 other distinguishing factors. But the real key there is,  
23 Mahoney didn't send it to somebody else in his office. He  
24 didn't share in the fee under the table. That's the other  
25 aspect of this case that I would not have Your Honor miss out

**Exhibit 5 - 19**

1 on, which is that eve under the 2015 agreement, that sham fee  
2 agreement, Mr. O'Toole never got anything remotely close to  
3 what he was entitled to. Mr. Hoey took a \$750,000 fee out of  
4 a 4 million dollar overall fee. He says after spending almost  
5 a million dollars in costs, five years, having a contract that  
6 entitles him to sixty percent of the fee, over 2 million  
7 dollars on gross, Mr. Hoey says, oh, I only got \$750,000 as a  
8 fee. Well, I'm asking to see the tax returns and I'm  
9 wondering --

10 THE COURT: All right. All right.

11 MR. FOYE: -- if there aren't -- Mr. Hoey and Mr. Keenan  
12 have an ongoing referral relationship.

13 THE COURT: All right. I'm going to take -- I'm going to  
14 take the motions to dismiss under advisement.

15 I'm going to see you in a week to find out why Ms.  
16 Wahlstrom is still in this case. And the parties are going to  
17 work together to figure out some arrangement where she is out  
18 of the case, because there is -- it's inexcusable that counsel  
19 have not prioritized that as the highest number one thing to  
20 do in this case, is to make sure that she is not going to part  
21 with a dime given that -- given the circumstances. Okay. You  
22 do not have to name her. And Mr. Hoey should be in a  
23 position of protecting her from any claim by you, by the  
24 plaintiff, okay, as against Ms. Wahlstrom.

25 That can be worked out. So we need a date when I can see

**Exhibit 5 - 20**

1 everybody back here. One of the days that we have allocated  
2 for a 2 o'clock list. I know they're full, but --

3 THE CLERK: For next week?

4 THE COURT: Well we can't do it next week because I don't  
5 think we have an afternoon.

6 THE CLERK: So June 8<sup>th</sup> or 14<sup>th</sup>.

7 THE COURT: June 8<sup>th</sup>?

8 THE CLERK: Uh-huh.

9 THE COURT: Can I see how full June 8 is.

10 Thank you.

11 THE CLERK: And I think we've added a couple of Rule 3  
12 16s since then.

13 THE COURT: Okay.

14 THE CLERK: But it's -- it's not bad.

15 THE COURT: No. Okay.

16 MR. FOYE: I have a mediation in another case scheduled  
17 on June 8<sup>th</sup>, Your Honor, but it looks like it's going to fall  
18 apart.

19 THE COURT: June 8<sup>th</sup> at 3:30.

20 MR. FOYE: Yes. I can do the mediation in the morning if  
21 I have to. June 8<sup>th</sup> at 3:30 will work for me.

22 MS. ZERNER: Yes, Your Honor.

23 MR. PINTA: Yes, Your Honor.

24 THE COURT: There are all kinds of ways to do this, but  
25 there's no reason, Mr. Foye, you agree?

**Exhibit 5 - 21**

1 MR. FOYE: Absolutely. Absolutely, Your Honor.

2 THE COURT: All right. All right.

3 MR. FOYE: They were friends. I mean she came to see us  
4 in --

5 THE COURT: Ms. -- Ms. Knipper, do you agree?

6 MS. KNIPPER: June 8<sup>th</sup> works, Your Honor.

7 THE COURT: Besides that, do you agree that there is a  
8 way to make sure that Ms. Wahlstrom is out of this case?

9 MS. KNIPPER: Well we certainly believe, and -- and we've  
10 expressed this. I mean the issue -- and I take issue with --

11 THE COURT: I'm not talking -- I'm not talking about a  
12 unilateral dismissal by the plaintiff. I'm talking about  
13 making sure that the plaintiff knows that any judgment that he  
14 might be able to recover against Ms. Wahlstrom will not come  
15 from Ms. Wahlstrom, it will come from your client, or -- or  
16 Mr. Keenan if he's still in the case.

17 MS. KNIPPER: I guess the only thing I would say to that,  
18 Your Honor, is that that presumes that there's a valid claim.  
19 And what we fundamentally disagree with --

20 THE COURT: No. You do not have to presume that. You do  
21 not have to presume that. You can presume that this is  
22 baloney, okay, but you are agreeing that there will be no  
23 obligation by Ms. Wahlstrom to pay a dime, and that she'll be  
24 out of this case. I want the parties here on the 8<sup>th</sup> at 3:30.  
25 Every lawyer involved in this case I want them here. Ms.

**Exhibit 5 - 22**

1 Wahlstrom does not have to be here.

2 MR. PINTA: Your Honor, my client is out-of-state.

3 THE COURT: Fine, he can be here.

4 Mr. Hoey will be here. Okay. Mr. O'Toole will be here.

5 MR. FOYE: He's here today, Your Honor.

6 MR. PINTA: Your Honor, may my client appear remotely via  
7 Zoom?

8 THE COURT: Where is he?

9 MR. PINTA: He's either in Atlanta or Florida, Your  
10 Honor, and I don't know his availability either.

11 THE COURT: He has to be -- he has to be available for  
12 consultation, and he has to be present at the hearing. Okay.  
13 He doesn't have to be here, I'll allow him to be on Zoom  
14 because he's out-of-state. Mr. Hoey has to be here.

15 MS. KNIPPER: I -- I will obviously --

16 THE COURT: Three --

17 MS. KNIPPER: I understand your order -- Your Honor is  
18 ordering it, I do not know if Mr. Hoey has a Court appearance  
19 in another case, and I don't know if he could appear if he's  
20 not here, but I presume -- I will instruct him. But I can't  
21 speak to his schedule.

22 THE COURT: If he's not going to be able to be here,  
23 you'll file a motion giving me three dates when he can be  
24 here, and all parties can be here.

25 All right. I'll take this under advisement. Thank you.

**Exhibit 5 - 23**

1 MS. KNIPPER: Thank you, Your Honor.

2 MR. FOYE: Thank you, Your Honor. Thank you very much.

3 MS. ZERNER: Thank you, Your Honor.

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(Adjourned)



## Exhibit 5 - 24

**The Commonwealth of Massachusetts  
OFFICE OF COURT MANAGEMENT, Transcription Services**

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**TRANSCRIBER NAME:** Donna H Dominguez

**CASE NAME:** O'Toole et al v Hoey et al **CASE NUMBER:** 2184CV00741

**RECORDING DATE** May 24 2022 **TRANSCRIPT VOLUME:** 1 **OF** 1

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"/s/ Donna Holmes Dominguez"  
Donna Holmes Dominguez, ACT, CET  
Notary Public, Commission Expires 5-17-24

September 26, 2022  
Date

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